Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1994

THE STATE OF WASHINGTON, et al.,

Petitioners,

v.

THE SPOKANE TRIBE OF INDIANS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 1994

QUESTIONS PRESENTED

1. Whether Congress has the power to abrogate the states' Eleventh Amendment immunity from suit in federal court pursuant to the Indian Commerce Clause, article I, section 8, clause 3 of the Constitution.

2. Whether the state can be deprived of its Eleventh Amendment immunity from suit in federal court under *Ex parte Young*, 209 U.S. 123 (1908), simply by naming state officers as defendants, when the Indian Gaming Regulatory Act provides only that an Indian tribe shall request the state to negotiate a Tribal-State compact for gaming and grants federal jurisdiction over any action initiated by an Indian tribe arising from the failure of the state to negotiate in good faith.

LIST OF PARTIES

The Petitioners in this Court are the State of Washington, the Governor of Washington, the Attorney General of Washington, and the Director of the Washington State Gambling Commission. Governor Booth Gardner was a defendant below. His successor in office is Governor Mike Lowry. Attorney General Kenneth O. Eikenberry was a defendant below. His successor in office is Attorney General Christine O. Gregoire. Deputy Director of the Washington State Gambling Commission Frank Miller was a defendant below. Mr. Miller is now Director of the Washington State Gambling Commission.

The Respondent in this Court and plaintiff below is the Spokane Tribe of Indians.

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The State of Washington, the Washington Governor and Attorney General, and the Director of the Washington State Gambling Commission respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reproduced in the Appendix at 1a through 20a and has not yet been reported. The district court's Order Re: Motion To Dismiss is reproduced in

the Appendix at 21a through 35a and is reported at 790 F. Supp. 1057 (E.D. Wash. 1991).

JURISDICTION

The court of appeals entered its decision on July 6, 1994. App. 2a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

The Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have power . . . to regulate commerce . . . with the Indian Tribes.

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutes

The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7) provides in part:

> (A) The United States district court shall have jurisdiction over–
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith[.]
> >
> > ...

> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (B)(vii).

25 U.S.C. § 2710 is reproduced in its entirety in the Appendix at 46a through 58a. The Appendix also contains other relevant provisions of the Indian Gaming Regulatory Act.

STATEMENT

1. The Indian Gaming Regulatory Act

This case arises under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, which regulates various types of gaming[1] on Indian lands. A tribe must meet certain requirements in order to lawfully conduct gaming designated as Class III.[2] One requirement is that Class III gaming must be conducted in conformance with a Tribal-State compact entered

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[1] IGRA divides gaming into three classes. Class I gaming involves social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals in connection with tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). App. 44a. Class II involves certain kinds of bingo and similar games of chance as well as certain card games. 25 U.S.C. § 2703(7). App. 44a through 46a. Class III gaming includes all forms of gaming that do not fall within Class I or II. 25 U.S.C. § 2703(8). App. 46a.

[2] Class III gaming includes such activities as lotteries, casino table games, slot machines, horse and dog racing, parimutuel wagering, off-track betting, and jai alai. S. Rep. No. 446, 100th Cong., 2d Sess. 3, 7 (1988).

into by an Indian tribe and the state in which the tribe is located. 25 U.S.C. § 2710(d)(1)(C). App. 52a.

Under IGRA a tribe desiring to conduct Class III gaming requests the state to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, IGRA provides that the state shall negotiate in good faith with the tribe to enter into the compact. 25 U.S.C. § 2710(d)(3)(A). App. 53a. Any Tribal-State compact entered into must be approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B). App. 53a-54a.

If the tribe and state cannot reach agreement on the terms of a compact, IGRA grants the federal district court jurisdiction over any cause of action brought by a tribe arising out of the failure to reach agreement. 25 U.S.C. § 2710(d)(7)(A)(i) provides that the district court shall have jurisdiction over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under [25 U.S.C. § 2710(d)(3)] or to conduct such negotiations in good faith." App. 55a. 25 U.S.C. § 2710(d)(7)(B)(i) provides that the tribe can initiate such an action "only after the close of the 180-day period beginning on the date on which the Indian tribe

requested the state to enter into negotiations under [25 U.S.C. § 2710(d)(3)(A)]."

If the district court finds that the state did not negotiate in good faith, it shall order the tribe and the state to conclude a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii). App. 56a. If they are unable to do so, IGRA provides that the state and the tribe shall each submit a proposed compact to a mediator appointed by the court and the mediator shall select one of the proposed compacts. 25 U.S.C. § 2710(d)(7)(B)(iv). App. 56a. The state has 60 days to consent to the compact selected by the mediator. If the state does not consent, the Secretary of the Interior, in consultation with the tribe, shall prescribe the procedures for the conduct of Class III gaming by the tribe. 25 U.S.C. § 2710(d)(7)(B)(vii). App. 57a.

2. The Controversy Between the State of Washington and the Spokane Tribe

In November 1988 the Spokane Tribe of Indians requested the State negotiate a Tribal-State compact for the conduct of Class III gaming.[3] Over the next two years the State and the Spokane Tribe exchanged correspondence and held meetings to negotiate a compact. However, no agreement was reached. In June 1991 the Spokane Tribe brought this action in

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[3] As of 1994, the State of Washington has entered into nine Tribal-State compacts that have been approved by the Secretary of the Interior.

the district court seeking a declaration that the State failed to negotiate in good faith. The defendants included the State, the Governor, the Attorney General, as well as the Deputy Director of the Gambling Commission, who was the principal negotiator for the State. The Spokane Tribe asserted jurisdiction under 25 U.S.C. § 2710(d)(7)(A)(i) and 28 U.S.C. § 1362. Complaint Par. 3.

3. Proceedings Before the District Court

The State and its officers moved to dismiss the action based on the State's sovereign immunity under the Eleventh Amendment.[4] Under the Eleventh Amendment a state will not be subject to suit in federal court unless it has consented to suit, either expressly or through the adoption of the Constitution (the plan of the convention). *Blatchford v. Native Village of Noatak*, 501 U.S. ___, 111 S. Ct. 2578, 2581 (1991). In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of this Court ruled that in adopting the Constitution, the states agreed to permit Congress to abrogate their immunity from suit when acting pursuant to the Interstate Commerce Clause. The district

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[4] U.S. Const. amend. XI:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

court concluded that IGRA was adopted pursuant to Congress's authority under the Indian Commerce Clause, article I, section 8, clause 3 of the Constitution. The district court granted the motion to dismiss the State of Washington because: "There is no basis for this Court to conclude that Congress has the authority to abrogate States' Eleventh Amendment sovereign immunity to suits from Indian Tribes by enacting legislation pursuant to the Indian Commerce Clause." 790 F. Supp. at 1061. App. 30a.[5]

The district court refused to dismiss the individual state officers. The Eleventh Amendment bars suits against state officials when the state is the real, substantial party in interest. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1983). However, in *Ex parte Young*, 209 U.S. 123 (1908), the Court recognized an exception to the general rule: "a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst*, 465 U.S. at 102. The district court ruled that the state officers were not immune from suit since "the Plaintiff Tribe's complaint against the individual defendants falls directly within the parameters set by *Ex parte Young*, because the Tribe is seeking a method to establish jurisdiction to require State officials to comply with a federal statute." 790 F. Supp at 1063. App. 34a.

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[5] The district court also concluded there was no basis to find that the State had consented to be sued. 790 F. Supp. at 1060. App. 26a.

4. Proceedings Before the Ninth Circuit Court of Appeals

The state officers timely appealed the district court's denial of their motion to dismiss pursuant to 28 U.S.C. § 1291.[6] Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the district court granted the Spokane Tribe's Motion for Certification for Appeal of an Interlocutory Order Dismissing Fewer Then All the Parties (App. 36a-40a) and the Spokane Tribe appealed the district court's Order dismissing the State of Washington.

On appeal the United States Court of Appeals for the Ninth Circuit reversed the district court's Order dismissing the State of Washington. According to the circuit court "Congress has the authority to abrogate Eleventh Amendment immunity when it is exercising a constitutional provision that gives Congress plenary power over matters affecting the states." App. 12a. Based on this premise, the court held that Congress has the power to abrogate the states' Eleventh Amendment immunity when acting pursuant to the Indian Commerce Clause. The court

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[6] A district court's denial of a claim of immunity by an individual official, to the extent it turns on an issue of law, is an appealable final decision within the meaning of 28 U.S.C. § 1291, notwithstanding the absence of a final judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf*, 506 U.S. ____, 113 S. Ct. 684 (1993).

relied primarily on the plurality opinion in *Pennsylvania v. Union Gas Co.*

The circuit court also vacated the district court's Order denying the state officers's motion to dismiss. According to the court: "The order of the district court permitting the case to go forward against the individual defendants under the doctrine of *Ex parte Young* is VACATED because it is no longer necessary. *See Kentucky v. Graham*, 473 U.S. 159, 167 & n.14 (1985) [.]" App. 19a.

REASONS FOR GRANTING THE PETITION

As the Ninth Circuit acknowledged (App. 17a), its decision that Congress has the power to abrogate the states' Eleventh Amendment immunity from suit in federal court conflicts with *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994). There is also a conflict between *Seminole Tribe* and *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993), which reached the same result as the Ninth Circuit. This conflict extends into the district courts and this issue is currently pending on appeal in the Fourth, Fifth and Tenth Circuits. It is important that this Court exercise its jurisdiction to resolve this conflict. Moreover, this case presents a fundamental question of federalism and provides the Court with an opportunity to resolve the confusion that exists in the wake of the plurality opinion in *Pennsylvania v. Union Gas*.

1. The Holding Below Conflicts With the Holding of the Eleventh Circuit in *Seminole Tribe of Florida v. Florida*

The Ninth Circuit ruled that Congress has the authority to abrogate the states' Eleventh Amendment sovereign immunity when acting pursuant to the Indian Commerce Clause. In *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016,[7] the Eleventh Circuit reached the opposite conclusion. The facts in *Seminole Tribe* are virtually identical to the facts in this case. The tribe brought an action against the state and its governor pursuant to 25 U.S.C. § 2710(d)(7)A)(i) for failure to negotiate a Tribal-State compact in good faith. The state moved to dismiss asserting immunity under the Eleventh Amendment. The Eleventh Circuit held that "Congress did not possess the power to abrogate the states' Eleventh Amendment immunity when it enacted IGRA." 11 F.3d at 1028. The Eleventh Circuit also ruled that the tribe could not maintain an action against the governor under *Ex Parte Young*. Id. at 1028-29.

The analysis of the Ninth and Eleventh Circuits differed in two important ways. First, the courts differed in their

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[7] This case involved two district court decisions consolidated for appeal. *Seminole Tribe of Florida v. Florida*, 801 F. Supp. 655 (S.D. Fla. 1992), *rev'd* 11 F.3d 1016 (11th Cir. 1994), in which the district court denied Florida's motion to dismiss based on sovereign immunity and *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991); 784 F. Supp. 1549 (S.D. Ala. 1992), in which the district court granted Alabama's motion to dismiss based on sovereign immunity.

application of the plurality opinion in *Pennsylvania v. Union Gas*. The Ninth Circuit concluded that "the *Union Gas* plurality framed its opinion in terms of the Commerce Clause as a whole, and did not limit it to the Interstate Commerce Clause." App. 15a-16a. The Ninth Circuit's conclusion is at odds with the plurality opinion.[8] The Eleventh Circuit reached the opposite conclusion from the Ninth Circuit stating: "We believe it is appropriate to limit *Union Gas* to the factual situation before that Court: the exercise of Congress' power to legislate under the Interstate Commerce Clause....[E]ach of the opinions [in *Union Gas*]--plurality, concurrences and dissents-- addressed only the Interstate Commerce Clause." 11 F.3d at 1027.

Second, the courts differed in their analysis of the nature of Congress's authority under the Interstate and Indian Commerce Clauses. The Ninth Circuit held that

> congressional power over both interstate and Indian commerce derives from the same clause in the Constitution; and we are hard pressed to conclude that the congressional authority to abrogate the States' immunity in the area of interstate commerce is greater than in Indian Commerce.... [W]e conclude that, based on its paramount and plenary authority over Indian affairs, Congress' power to act pursuant to the

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[8] The plurality opinion in *Pennsylvania v. Union Gas* states: "[A] careful regard for precedent still would m[illegible]late the conclusion that Congress has the power to abrogate immunity whe[illegible]ercising its plenary authority to *regulate interstate commerce*." 491 U.S. at 15 (emphasis added).

Indian Commerce Clause is at least as great, if not greater, than its power under the Interstate Commerce Clause.

App. 17a (*quoting Seminole Tribe of Florida v. Florida*, 801 F. Supp. 655, 662 (S.D. Fla. 1992), *rev'd* 11 F.3d 1016 (11th Cir. 1994).

In contrast, the Eleventh Circuit focused on "the unique qualities that distinguish the Interstate Commerce Clause and the Indian Commerce Clause." 11 F.3d at 1027. The court stated:

> In [*Cotton Petroleum Corp v. New Mexico*, 490 U.S. 163 (1989)], the Court acknowledged the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states in order to "maintain[]free trade among States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate that they be treated distinctly. As a result, the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause.

11 F.3d at 1027.

Thus, the Ninth and Eleventh Circuits applied conflicting analysis to reach their opposite conclusions. The Ninth Circuit was aware of the Eleventh Circuit's opinion but chose not to follow it, relying instead on the district court opinion in *Seminole Tribe*,[9] which was reversed by the Eleventh Circuit. App. 17a.

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[9] *See infra* p. 10 and note 7.

There is also a conflict between the Eleventh Circuit decision and the decision of the Eighth Circuit in *Cheyenne River Sioux Tribe*, 3 F.3d 273. In *Cheyenne River Sioux*, the Eighth Circuit, like the Ninth Circuit, applied the district court opinion in *Seminole Tribe of Florida*, which was reversed by the Eleventh Circuit,[10] and concluded that Congress could abrogate the states' sovereign immunity under the Indian Commerce Clause. 3 F.3d at 280-81.

The Seminole Tribe and the Poarch Band of Creek Indians have sought review of the Eleventh Circuit's decision upholding the states' sovereign immunity and the Tribes' petitions for writs of certiorari are currently pending before this Court. See *Seminole Tribe of Florida v. Florida*, No. 94-12; *Poarch Band of Creek Indians v. Alabama*, No. 94-189.[11]

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[10] *See infra* p. 10 and note 7.

[11] In part V of its decision, the Eleventh Circuit concluded that the Secretary of the Interior could directly prescribe regulations governing Class III gaming on Indian land, if a state successfully asserted its Eleventh Amendment immunity. 11 F.3d at 1029. Alabama and Florida are seeking review of this aspect of the decision. *See Alabama v. Poarch Creek Indians*, No. 94-35 and *Florida v. Seminole Tribe of Florida*, No. 94-219.

2. There is a Conflict Among District Courts and the Issue is on Appeal in Three Other Circuits

The conflict on this issue also extends into the district courts. A majority of district courts considering the issue have upheld the states' immunity from suit under IGRA. However, there are several district court decisions that reach the opposite conclusion. At present, appeals on this issue are pending in the Fourth, Fifth and Tenth Circuits.[12] *See Eastern Band of Cherokee Indians v. North Carolina*, No. 2:92-CV-239, slip op. (W.D. N.C. June 16, 1993), (granted motion to dismiss on Eleventh Amendment grounds), *appeal docketed*, No. 93-1936 (4th Cir. 1993); *Ysleta Del Sur Pueblo v. Texas*, 852 F. Supp. 587 (W.D. Tex. 1993) (denied motion to dismiss on Eleventh Amendment grounds), *appeal docketed*, Nos. 93-8823 & 93-8477 (5th Cir. 1993); *Ponca Tribe v. Oklahoma*, 834 F. Supp. 1341 (W.D. Okla., 1992) (granted motion to dismiss on Eleventh Amendment grounds), *appeal docketed*, No. 92-6331 (10th Cir. 1992); *Pueblo of Sandia v. New Mexico*, No. CIV 92-613-JC, slip op. (D. N.M. Nov. 13, 1992) (granted motion to dismiss on

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[12] In addition, there are still two appeals pending in the Ninth Circuit that raise this issue. *See Blackfeet Tribe v. Jessup*, No. CV-93-031-GF, slip op. (D. Mont. Dec. 23, 1993), (granted motion to dismiss on Eleventh Amendment grounds) *appeal docketed* No. 94-35079 (9th Cir. 1994); *Fort Belnap Indian Community v. Montana*, slip op. No. CV-92-098-GF (D. Mont. Jan. 5, 1994), (granted motion to dismiss on Eleventh Amendment grounds) *appeal docketed* No. 94-35126 (9th Cir. 1994).

Eleventh Amendment grounds), *consolidated on appeal with Apache Tribe of Mescalero Reservation v. New Mexico*, No. CIV 92-076-JC, slip op. (D. N.M. Dec. 22, 1992) (granted motion to dismiss on Eleventh Amendment grounds), *appeal docketed*, Nos. 93-2018 & 93-2020 (10th Cir. 1993); *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas v. Kansas*, No. 92-4233-SAC, slip op. (D. Kan. Mar. 29, 1993), *consolidated for trial with Prairie Band of Potawatomi Indians v. Kansas*, No. 92-4234-SAC, slip op. (D. Kan. 1993) (denied motion to dismiss on Eleventh Amendment grounds), *appeal docketed*, No. 93-3110 (10th Cir. 1993).

3. This Case Presents a Fundamental Question of Federalism That Requires Resolution by This Court

This case falls precisely within the considerations governing review on a writ of certiorari described in Rule 10.1(a). IGRA has important consequences for both Indian tribes and states and the law impacts every region of the United States. There is a substantial conflict among the circuit courts and district courts concerning the ability of a tribe to bring an action against a state under IGRA. This Court should exercise its jurisdiction to resolve this conflict and provide guidance to the lower courts.

Moreover, this case involves a fundamental question of federalism: What is the scope of Congress's authority to

abrogate the states' sovereign immunity to a suit in federal court under the Eleventh Amendment? This Court has recognized "the Eleventh Amendment's role as an essential component of our constitutional structure[.]" *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Under that structure "the States entered the federal system with their sovereignty intact; . . . the judicial authority in Article III is limited by this sovereignty and . . . a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the plan of the convention." *Blatchford*, 111 S. Ct. 2581 (citations omitted).

The Court has held that, in adopting the Constitution (the plan of the convention), the states' waived their immunity to suits in federal court brought by the United States (*see United States v. Mississippi*, 380 U.S. 128, 140-41 (1965)) and by sister states (*see South Dakota v. North Carolina*, 192 U.S. 286, 315 (1903)). In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held, for the first time, that Congress has the power to enact a statute that abrogated the states' Eleventh Amendment immunity when acting pursuant to its authority under section 5 of the Fourteenth Amendment. Of course, the Fourteenth Amendment was adopted "after the plan of the convention" and section 5 specifically provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Thus,

Fitzpatrick did not resolve the question of Congress's authority to abrogate state immunity under the "plan of the convention".

This question was presented in *Pennsylvania v. Union Gas* where a sharply divided Court considered whether Congress has the power to abrogate the states' immunity to suit, when acting pursuant to the Interstate Commerce Clause. A plurality of the Court concluded that Congress has that power. The Ninth Circuit in this case adopted a very expansive interpretation of *Union Gas* stating: "Congress has the authority to abrogate Eleventh Amendment immunity when it is exercising a constitutional provision that gives Congress plenary power over matters affecting the states." App. 12a.

Thus, under the Ninth Circuit's view, Congress has broad power to abrogate the states' immunity from suit in federal court. This would essentially reduce the states' Eleventh Amendment immunity to a mere default option applicable unless and until Congress chooses to act.

"[A]brogation of sovereign immunity upsets the fundamental constitutional balance between the Federal government and the States[.]" *Dellmuth*, 491 U.S. at 227 (*quoting Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). This case directly presents the question of the scope of Congress's power to upset this "fundamental constitutional balance".

At present, the only other decision to address this question directly is *Pennsylvania v. Union Gas*. However, *Union Gas* is of limited assistance since none of the opinions filed in the case commanded a majority of the Court. In addition, the plurality opinion has been subject to different interpretations by the Ninth and Eleventh Circuits. This fundamental issue of federalism requires resolution. The Court should exercise its jurisdiction in this case to resolve the issue.

4. The Court Should Review the Application of Ex Parte Young to the Claim of Immunity by State Officers

This case also presents the question of whether the Eleventh Amendment immunity of the state from suit in federal court under IGRA can be overcome by naming state officers as defendants. The Ninth Circuit vacated the district court's Order that the state officers were not immune from such a suit. App. 19a. However, the basis for the circuit court's decision was that the district court's ruling "was no longer necessary" in light of the Ninth Circuit's decision that the State was not immune from suit under IGRA. App. 19a. The Ninth Circuit's ruling on state immunity is in error and we have challenged it in this petition. If this Court reverses this ruling, the question of the immunity of state officers will be directly presented.

The district court based its ruling on the exception in *Ex parte Young*, which is based on the theory that a state officer may not be authorized by the state to do an unconstitutional act.

> [A]n unconstitutional enactment is "void" and therefore does not "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." Since the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct."

Pennhurst State School, 465 U.S. at 102 (citations omitted) (*quoting Ex parte Young*, 209 U.S. at 160).

The *Ex parte Young* doctrine has no application in this case. The Spokane Tribe does not allege that the state officers in this case violated the Constitution or are attempting to enforce an unconstitutional state law. Federal law does not impose an obligation on any state officers to negotiate a Tribal-State compact. IGRA is directed solely at the state, itself. *See* 25 U.S.C. § 2710(d)(3)(A), (7)(A)(i). App. 53a, 55a.

The district court's decision on this issue, which conflicts with the Eleventh Circuit's decision in *Seminole Tribe*, is particularly troubling. An important part of the district court's rationale was that jurisdiction over state officers was necessary because there was no jurisdiction over the State. Thus, the district court was concerned that "failure to assert jurisdiction [over state officers] will deprive the Tribe of a forum in which to present its contentions." 790 F. Supp. at 1063. App. 34a.

The theory of *Ex parte Young* "has not been provided an expansive interpretation" by the Court. *Pennhurst State School*, 465 U.S. at 102. The notion, that the exception in *Young* is merely an alternative method of obtaining jurisdiction when the state is immune, is wrong. The exception in *Ex parte Young* is limited to certain specific situations that are not present in this case. The application of *Ex parte Young* is directly presented in this case and the Court should exercise its jurisdiction to resolve the application of *Ex parte Young* to suits brought against state officers under IGRA.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August 1994

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE SPOKANE TRIBE OF INDIANS, Plaintiff-Appellee, v. WASHINGTON STATE, THE STATE OF WASHINGTON; BOOTH GARDNER, GOVERNOR OF THE STATE OF WASHINGTON; KEN EIKENBERRY, ATTORNEY GENERAL OF THE STATE OF WASHINGTON; FRANKLIN L. MILLER, DEPUTY DIRECTOR OF THE WASHINGTON STATE GAMBLING COMMISSION, Defendants-Appellants.	No. 92-35113 D.C. No. CV-91-212-FVS
THE SPOKANE TRIBE OF INDIANS, Plaintiff-Appellant, v. WASHINGTON STATE, THE STATE OF WASHINGTON; BOOTH GARDNER, GOVERNOR OF THE STATE OF WASHINGTON; KEN EIKENBERRY, ATTORNEY GENERAL OF THE STATE OF WASHINGTON; FRANKLIN L.	No. 92-35446 D.C. No. CV-91-212-FVS OPINION

MILLER, DEPUTY DIRECTOR OF THE WASHINGTON STATE GAMBLING COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding

Argued and Submitted
October 5, 1993--Seattle, Washington

Filed July 6, 1994

Before: Alfred T. Goodwin, Mary M. Schroeder, and Harry Pregerson, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY

Government Law/Native Americans/Immunity

The court of appeals reversed a district court judgment and remanded. The court held that a state was not immune from an Indian tribe's suit under the Indian Gaming Regulatory Act (IGRA) to enforce Congress' mandate that states negotiate in good faith with tribes to reach tribal gaming compacts.

Under the IGRA, in order to conduct certain gaming on Indian lands, an interested Indian tribe must enter into a Tribal-

State Compact governing gaming with the state in which the Indian lands are located. According to the statutory scheme, the tribe initiates the negotiation process, and the state shall negotiate with the tribe in good faith to enter a compact. The statute confers jurisdiction on district courts over causes of action initiated by tribes arising from a state's failure to conduct the negotiations in good faith.

Appellee the Spokane Tribe of Indians filed a request with appellant the governor of appellant the state of Washington to begin the process of negotiating a gaming compact. After the State rejected compacts submitted by the Tribe, the State demanded that the Tribe either acquiesce to state jurisdiction and state-imposed limitations on gaming, or pursue remedies under the IGRA.

The Tribe filed a complaint in the district court against the State, its Governor, its Attorney General and its Deputy Director, alleging that the state violated the IGRA. The Tribe sought a declaratory judgment that the State had failed to negotiate in good faith or enter into negotiations, and an injunction directing the parties to conclude a compact within 60 days. The district court granted the defendants' motion to dismiss as to the State, but denied it as to the individual defendants.

[1] The Supreme Court has held that the Eleventh Amendment bars suits by a citizen against the citizen's own state. The Court later held that states may be subject to suit in federal court if Congress has abrogated their immunity through the exercise of its constitutional power.

[2] The Court has also held that Congress possesses the power of abrogation under the Interstate Commerce Clause. [3] The Court's analysis was equally applicable to the Indian Commerce Clause.

[4] In this case, Congress was acting under one of its plenary powers. [5] The IGRA was passed to fill a void in Indian gaming regulations that arose from the states' dependence on Congress for any authority to regulate tribal affairs. The states' immunity from suits under the Eleventh Amendment should not frustrate the IGRA's goal.

[6] Thus, the State was not immune from the Tribe's suit under the IGRA to enforce the clear congressional mandate that states negotiate in good faith with tribes to reach tribal gaming compacts. Accordingly, the district court's judgment dismissing the action against the State was reversed, and the order permitting the case to go forward against the individual defendants was vacated because it was no longer necessary.

COUNSEL

Scott D. Crowell, Kirkland, Washington, for the plaintiff-appellee-cross-appellant.

Jonathan T. McCoy, Assistant Attorney General, Olympia, Washington, for the defendants-appellants-cross-appellees.

Howard L. Dickstein, Dickstein & Merin, Sacramento, California, for the amici.

Hans Walker, Jr., Hobbs, Straus, Dean & Wilder, Washington, D.C., for the amicus curiae.

Thomas E. Gede, Special Assistant Attorney General, Sacramento, California, for the amici.

OPINION

SCHROEDER, Circuit Judge:

This is a suit by the Spokane Tribe of Indians ("the Tribe") against the State of Washington to compel the state to negotiate in good faith for terms of a gaming compact as required by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (Supp. 1994). The dispositive issue in this appeal and cross-appeal is whether the state is immune from this suit under the Eleventh Amendment despite the fact that Congress, acting pursuant to its plenary constitutional power to regulate Indian affairs, clearly intended to authorize such suits. There is an existing circuit conflict on this issue. The Eighth Circuit has held that states are not immune, *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993), while the Eleventh Circuit has held that they are. *Seminole Tribe of*

Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994). The district court in this case dismissed the action against the State, but permitted it to go forward against individual state officers under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). We reverse, holding that the state is not immune from suit and that it is therefore unnecessary to proceed under *Ex Parte Young*.

I. *Statutory and Procedural Background*

Congress enacted the IGRA in 1988 in response to the 1987 Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The Ninth Circuit there had held that Public Law 280, 67 Stat. 588, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 ed. & Supp. III), did not authorize California to enforce its gaming laws on Indian Reservations. Affirming the decision of this court, the Supreme Court held that because California did not prohibit gambling altogether, the gaming laws were not within Public Law 280's grant of criminal jurisdiction. The case left Indian tribes whose reservations lay in states that permit gaming free of any state regulation.

In the new statute, Congress created three classes of gaming: "Class I" consists of social games for minimal prizes and traditional Indian games; "Class II" includes Bingo and similar games of chance such as pull tabs and lotto; "Class III" includes all games not included in Classes I or II. 25 U.S.C.

§§ 2703(6)-(8). In order to conduct Class III gaming on Indian lands, the interested tribe must enter into a Tribal-State Compact governing gaming with the state in which the Indian lands are located. 25 U.S.C. § 2710(d)(1)(c). This case involves Class III gaming that must be conducted in conformance with a Tribal-State Compact.

According to the statutory scheme, an Indian tribe initiates the negotiation process by requesting the state in which the tribe's lands are located to enter into negotiations for a gaming compact. 25 U.S.C. § 2710(d)(3)(A). "Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* If the state fails to negotiate in good faith, the statute confers jurisdiction on the United States district courts over "any cause of action initiated by an Indian tribe arising from a failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State Compact . . . or to conduct such negotiations in good faith." § 2710(d)(7)(A)(i). The court may then order the state and the tribe to reach an agreement within 60 days. § 2710(7)(B)(iii). If the parties do not reach agreement within the 60 day period after the court's order, the court is directed to appoint a mediator. If mediation fails, the Secretary of Interior is authorized to impose regulations after consultation with the mediator. § 2710(7)(B)(iv)-(vii).

In this case, the Tribe filed a request on November 14, 1988 with Governor Gardner to begin the process of negotiating a compact. Formal negotiations began in August of 1989. Although the parties met several times during 1990 and 1991, Washington rejected both the draft compact prepared by the Tribe and a universal compact submitted by the Tribe together with other Indian tribes. Finally, on June 4, 1991, Washington demanded that the Tribe either acquiesce to state jurisdiction and state-imposed limitations on gaming or pursue remedies under the IGRA.

The Tribe filed its complaint in this case on June 6, 1991, naming as defendants the State of Washington, Governor Gardner, State Attorney General Eikenberry, and Deputy Director Miller. The complaint alleged that the state had violated the IGRA. The Tribe sought a declaratory judgment that the state had failed to negotiate in good faith or enter into negotiations, and an injunction directing the parties to conclude a compact within 60 days.

Defendants filed a motion to dismiss on behalf of both the state and individual defendants. The district court granted the defendants' motion as to the state but denied it as to the individual defendants. The individual defendants appealed the court's denial of their claim of immunity, and the district court

certified that portion of his order dismissing the Tribe's action against the state for appeal pursuant to Fed. R. Civ. P. 54(b).

II. *Eleventh Amendment Immunity*

[1] More than 100 years ago, the Supreme Court held in *Hans v. Louisiana*, 134 U.S. 1 (1890) that the Eleventh Amendment of the United States Constitution bars suits by a citizen against the citizen's own state, as well as suits by citizens of another state.[1] In a series of more recent decisions, the Supreme Court has further refined the meaning of Eleventh Amendment immunity, holding that states may be subject to suit in federal court if they have consented to jurisdiction or if Congress has abrogated that immunity through the exercise of its constitutional power. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (state had waived Port Authority's immunity by specifically providing that the Port Authority could be sued with venue "laid within a . . . judicial district, established by . . . the United States"); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (Congress may abrogate state

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[1] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

sovereign immunity under its Commerce Clause power, and CERCLA specifically effects such abrogation); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 477 (1987) (Congress had not clearly expressed intention to allow states to be sued under the Jones Act); *County of Oneida, N.Y. v. Oneida Indian Nation*, 470 U.S. 226 (1985) (court did not have ancillary jurisdiction over question of state law, where state had not consented to suit in federal court as to that issue); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985) (state had not waived immunity, and Congress had not abrogated it in the Rehabilitation Act); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress may abrogate states' immunity under the Fourteen Amendment). In this case, the Tribe has never contended that Washington consented to federal jurisdiction. The issue for us therefore is whether the statute has abrogated the state's immunity.

III. *Congressional Intent*

The Supreme Court has made clear that in order to overcome the Eleventh Amendment, congressional intent to abrogate immunity must be expressed unequivocally in the language of the statute. *See Port Auth. Trans-Hudson Corp.*, 495 U.S. at 305; *Atascadero State Hosp.*, 473 U.S. at 242-43; *Hale v. Arizona*, 993 F.2d 1387, 1391 (9th Cir. 1993) (en banc),

cert. denied, 114 S. Ct. 386 (1993). A general authorization to sue is not sufficient. *Atascadero State Hosp.*, 473 U.S. at 246.

Our discussion of congressional intent need not be lengthy. Every federal court that has considered the issue has concluded that the IGRA's language reveals a clear intent to abrogate the states' Eleventh Amendment immunity. *E.g.*, *Cheyenne River*, 3 F.3d 273; *Seminole Tribes*, 11 F.3d 1016. Section 2710(d) authorizes suit in federal court for injunctive relief. It further provides that once a tribe has introduced evidence that a tribal state compact has not been entered into and that the state has failed to respond to the tribe's request for negotiations or did not respond in good faith, the burden of proof is on the state to prove that it negotiated in good faith. § 2710(d)(7)(B)(ii). Congress' intent could not be much clearer. As one court stated:

> The tribe's suit and the federal court's jurisdiction are triggered under [section 2710(d)(7)(A)(i)] by the particular state's failure to negotiate in good faith. The state is the only possible defendant to such a suit, and it is the only other party to the compact negotiations. Congress fully contemplated and expressed its desire to give the tribes a federal forum by which they could compel the states to negotiate fairly with them. This is not just a permissible inference; it is the only reasonable inference. . . . Short of mentioning the Eleventh Amendment or sovereign immunity, a clearer statement of the intent to abrogate is difficult to envision.

Kickapoo Tribe v. Kansas, 818 F. Supp. 1423, 1427 (D. Kan. 1993).

The more difficult issue we must decide is therefore whether Congress had the power to abrogate the states' immunity from suits by Indian tribes when it enacted the IGRA to regulate tribal gaming ventures.

IV. *Congressional Power and the Indian Commerce Clause*

[2] The Supreme Court's recent decisions tell us that Congress has the authority to abrogate Eleventh Amendment immunity when it is exercising a constitutional provision that gives Congress plenary power over matters affecting the states. Such authority clearly exists with respect to § 5 of the Fourteenth Amendment. *See, e.g., Fitzpatrick*, 427 U.S. at 456 (Eleventh Amendment is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment"). The Court has also held that Congress possesses the power of abrogation under the Interstate Commerce Clause. *Union Gas*, 491 U.S. 1.

The Supreme Court has never specifically addressed the intersection of federal power over tribes and state sovereign immunity that the IGRA represents. The Court in *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991), held that the Eleventh Amendment generally bars suits against a state by an Indian tribe. *Id.* at 2581-83. While acknowledging that the states waived their immunity to suits by other states when they

adopted the Constitution, the Court rejected the argument that Indian tribes could be treated as states for this purpose. The Court reasoned that the states' waiver vis a vis other states was founded upon a "mutuality of . . . concession," that was lacking between the states and Indian tribes. *Id.* But this holding, that a general waiver of immunity from suits against tribes cannot be inferred from the Constitution itself, does not address the question of whether Congress may abrogate that immunity under the Indian Commerce Clause when it acts with the clarity of purpose that it did in the IGRA.

The Court's holding in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), upon which the district court relied, is similarly inapplicable. The Court there held only that a state could tax non-Indian oil and gas interests located on Indian lands and subject to tribal taxes without impermissibly burdening commerce "with" Indian tribes, even though such double taxation might impermissibly burden commerce "among" states if imposed on activity within another state. In reaching this conclusion, the Court noted that Interstate Commerce Clause doctrine cannot always readily be applied to cases involving the Indian Commerce Clause. This statement, however, does not speak to the scope of congressional power under either the Interstate Commerce Clause or the Indian Commerce Clause.

The Supreme Court case more closely related to our situation is *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The *Union Gas* Court held that Congress has the power to abrogate the states' immunity from suit under the Commerce Clause. The plurality opinion first noted that the states had necessarily "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," including any aspect of that sovereignty which would stand in the way of this congressional power. *Id.* at 14 (quoting *Parden v. Terminal Railway*, 377 U.S. 184 (1964), *overruled on other grounds by Welsh v. Texas Dept' of Highways & Public Transp.*, 483 U.S. 468 (1987)). Next, the opinion noted that in *Fitzpatrick v. Bitzer*, the Court had held that Congress could abrogate the states' immunity under the Fourteenth Amendment for reasons that were precisely applicable to the Commerce Clause:

> "When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."
>
> . . .
>
> Each of these points is as applicable to the Commerce Clause as it is to the Fourteenth Amendment. Like the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States. . . . The important point, . . . is that the provision both expands federal power and contracts state power; that is

> the meaning, in fact, of a "plenary" grant of authority.

Id. at 16. (quoting *Fitzpatrick*, 427 U.S. at 456). Although Justice Brennan's opinion in *Union Gas* was a plurality opinion, a fifth Justice, Justice White, agreed that states are not immune from suit under statutes enacted pursuant to the Interstate Commerce Clause, provided the congressional intent is clear. 491 U.S. at 57 (White, J., concurring in part).

[3] The district court in this case concluded that because "a significant difference exists" between congressional power under the Indian Commerce Clause and the Interstate Commerce Clause, there was "no basis" for holding that Congress could abrogate state sovereign immunity under the Indian Commerce Clause. We cannot agree with the district court that the differences between the Indian and the Interstate Commerce Clauses support state immunity from tribal suit where, as here, Congress has authorized such suits. Congress' power over both Indian and interstate commerce is set forth in Article I, § 8:

> The Congress shall have power,
>
> . . .
>
> 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes[.]

Moreover, the analysis developed by the Supreme Court in both *Union Gas* and *Fitzpatrick v. Bitzer* is equally applicable to the Indian Commerce Clause. In fact, the *Union Gas* plurality

framed its opinion in terms of the Commerce Clause as a whole, and did not limit it to the Interstate Commerce Clause.

[4] In this case, as in *Union Gas* and *Fitzpatrick*, Congress is acting under one of its plenary powers. As the Supreme Court explained in *Cotton Petroleum*, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. In 1832, the Supreme Court pronounced that the Indian Commerce Clause, together with Congress' constitutional power to conclude treaties with Indian tribes, provide Congress with "all that is required" for complete control over Indian affairs. *Worcester v. Georgia*, 31 U.S. 515, 558 (1832).

This broad grant of power to Congress over Indian affairs necessarily limits the power of the states. Generally, unless Congress has authorized a state to apply its laws to Indian activities on a reservation, the state has no authority to do so. *Antoine v. Washington*, 420 U.S. 194 (1975); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959). The Supreme Court stated in *McClanahan* that "'[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history.'" 411 U.S. at 168 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)). Thus, "absent congressional action, a tribe retains its inherent right of self government and no state may impose its

laws on the reservation." Stephen Pevar, *Rights of Indians and Tribes* 79 (1992). In a recent reaffirmation of this principle, the Supreme Court in 1991 stated that "Indian tribes are 'domestic dependent nations' which exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Ban Potawatomi Indian Tribe*, 111 S. Ct. 905 (1991).

Congressional power pursuant to the Indian Commerce Clause, then, cannot be less than its authority under the Interstate Commerce Clause. We therefore agree with District Judge Marcus when he said that:

> congressional power over both interstate and Indian commerce derives from the same clause in the Constitution; and we are hard pressed to conclude that the congressional authority to abrogate the States' immunity in the area of interstate commerce is greater than in Indian commerce. . . . [W]e conclude that, based on its paramount and plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater, than its powers under the Interstate Commerce Clause.

Seminole Tribe v. Florida, 801 F. Supp. 655, 662 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994). Reversing the district court in that case, the Eleventh Circuit questioned the continuing vitality of the *Union Gas* decision in light of changing Supreme Court membership and the lack of majority opinion. The case, however, remains binding authority upon us. Moreover, even if the Supreme Court were to overrule *Union Gas* and hold that Congress' power to regulate interstate

commerce does not permit Congress to abrogate sovereign immunity, Congress' broader authority over tribal affairs would remain.

[5] The IGRA was passed to fill a void in Indian gaming regulation that arose from the states' dependence on Congress for any authority to regulate tribal affairs. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In grappling with sensitive issues following the state of California's defeat in *Cabazon Band*, Congress tried to fashion a plan that would enable the states to have a voice in how tribal gaming should operate and to enforce to some degree the states' own laws. The states' immunity from suits under the Eleventh Amendment should not frustrate that goal. Indeed, principles of state sovereignty are singularly out of place in such a scheme, where the federal government is tailoring a limited grant of power to the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests.

The Eleventh Circuit was concerned by the regulatory void that it might leave by invalidating the IGRA's provisions for federal judicial enforcement. Those concerns illustrate the problem caused when state sovereignty is injected into the federal scheme. The Eleventh Circuit reasoned that a void was not necessary because the provisions of the statute authorizing the Secretary of Interior to impose regulations would come into

effect once a state asserted immunity from suit. When that occurred the Secretary of the Interior would, in the Eleventh Circuit's view, remain authorized to impose regulations for Class III gaming. *Seminole Tribe*, 11 F.3d at 1029. In our view, however, such a result would pervert the congressional plan. This is because the Secretary of the Interior under the statute is to act only as a matter of last resort, and then only after consulting with the court appointed mediator who has become familiar with the positions and interests of both the tribes and the states in court directed negotiations. 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii). The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation.

[6] For the foregoing reasons, we conclude that the State of Washington is not immune from this suit under the IGRA to enforce the clear congressional mandate that states negotiate in good faith with tribes to reach tribal gaming compacts. The judgment of the district court dismissing the action against the state is REVERSED. The order of the district court permitting the case to go forward against the individual defendants under the doctrine of *Ex Parte Young* is VACATED because it is no longer necessary. *See Kentucky v. Graham*, 473 U.S. 159, 167 & n.14 (1985) (any immunity of state officers acting in their official capacities depends upon state immunity).

Defendants contend that regardless of immunity, the case should be dismissed as to the individual defendants because the IGRA does not authorize suit against individual officers. The district court may consider this argument on remand.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE SPOKANE TRIBE OF INDIANS, Plaintiff, vs. THE STATE OF WASHINGTON et al., Defendants.	No. CS-91-212-FVS ORDER RE MOTION TO DISMISS

BEFORE THE COURT is Defendants' Motion to Dismiss Suit, and in the alternative, To Dismiss the Individual Defendants, Ct. Rec. 9. A telephonic conference was held in this matter on October 28, 1991, and another telephonic conference was held on November 27, 1991. Scott Crowell appeared on behalf of the Spokane Tribe of Indians, and Richard Heath, Jonathan McCoy, and Kim O'Neal appeared on behalf of the State of Washington. An amicus curiae brief was filed by the National Indian Gaming Association on behalf of the Spokane Tribe of Indians. Having reviewed the record and heard from counsel, the Court **GRANTS** Defendants' Motion to Dismiss the Defendant State of Washington, and **DENIES** Defendants' Motion to Dismiss the Individual Defendants, **Ct. Rec. 9.**

PROCEDURAL HISTORY

The Spokane Tribe of Indians ("Tribe") brought this action against the State of Washington ("State") for allegedly failing to negotiate in good faith with the Tribe concerning proposed gambling activities on the reservation. The Tribe is seeking enforcement of provisions of the Indian Gaming Regulation Act, 25 U.S.C. §§ 2701 et. seq., which require that a state negotiate with a tribe in "good faith" to establish gaming regulations within Tribal jurisdiction. The Tribe alleges federal court jurisdiction under both the Indian Gaming Regulation Act and 28 U.S.C. § 1362.

The State of Washington moves to dismiss this action for lack of jurisdiction, pursuant to Fed. R. Civ. P. 12(b), on the grounds that state sovereign immunity, as established by the Eleventh Amendment of the United States Constitution, bars this suit. In the alternative, the State moves to dismiss the individual defendants named in the complaint on the grounds that the Ex Parte Young doctrine does not apply to this case.

FACTS

Congress enacted the Indian Gaming Regulation Act (IGRA), 25 U.S.C. §§ 2701 et. seq., in 1988 to establish a comprehensive federal regulatory system for on-reservation Indian gaming. The IGRA divides all gaming into three classes: (1) traditional forms of Indian gaming, for minimal value;

(2) bingo and related forms of gaming such as pull-tabs, punch boards, lotto, tip jars, instant bingo, etc.; and (3) all other gaming, including casino games, parimutuel betting, etc. 25 U.S.C. § 2703. The IGRA requires that a tribal/state compact be drawn for regulation of Class III gaming. 25 U.S.C. § 2710(d)(1)(C).

The Spokane Tribe of Indians, a federally recognized Tribe of Indians, is a sovereign Indian nation that exercises powers of self-government through its governing body, the Spokane Business Council, pursuant to its constitution and bylaws.

The Tribe alleges that on November 14, 1988, a letter was sent to Governor Booth Gardner requesting formal negotiations to establish a tribal/state compact regarding tribal gaming. On August 7, 1989, the Tribe and the State had an initial formal negotiation session. During the next two years the negotiations continued, but without successfully arriving at a tribal/state compact. The Spokane Tribe of Indians joined a coalition of tribes in Washington State and developed a proposed universal compact. On May 13, 1991, the State rejected the proposed universal compact submitted by the Tribe.

The Tribe alleges that the State is acting in bad faith in the negotiation process and seeks remedies available under 25 U.S.C. §§ 2710 et. seq. The IGRA includes a requirement that

the states negotiate with tribes in good faith. The statute provides that:

> The United States district courts shall have jurisdiction over--
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . .

25 U.S.C. § 2710(d)(7)(A).

If a state fails to comply with the statute by failing to negotiate in good faith, a district court can order the state to conclude a compact within a 60 day period. 25 U.S.C. § 2710(d)(7)(B)(iii). If the tribe and state fail to achieve a compact within the 60 day period, the district court can appoint a mediator who considers "the last best offer" from each side and selects one of the proposals to be the final compact. 25 U.S.C. § 2710(d)(7)(B)(iv).

In the complaint, the Tribe contends that federal court jurisdiction is established by the IGRA as well as by 28 U.S.C. § 1362. The State raises sovereign immunity, established by the Eleventh Amendment of the United States Constitution, as a bar to this action. The State contends that no exception to Eleventh Amendment sovereign immunity has been established in this

case, that no federal court jurisdiction exists, and this case should be dismissed.

DISCUSSION

The first basis that the Court analyzes for federal court jurisdiction is 28 U.S.C. § 1362. This section provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1362.

In previous cases, courts, including this one, have interpreted 28 U.S.C. § 1362 as establishing federal court jurisdiction by serving as an abrogation of states' Eleventh Amendment immunity[1] when suit is brought by an Indian tribe. However, the United States Supreme Court recently reviewed the question of whether section 1362 establishes federal court jurisdiction, in and of itself, in Blatchford v. Native Village of Noatak and Circle Village, 111 S.Ct. 2578 (1991). In

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[1] The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State.

U.S. CONST., amend XI.

Blatchford, the Court determined that section 1362 "does not enable tribes to overcome . . . sovereign immunity." Blatchford v. Native Village of Noatak and Circle Village, 111 S.Ct. at 2586 n. 5 (1991).

It appears that sovereign immunity must be overcome by a source independent of 28 U.S.C. § 1362 in order for federal court jurisdiction to be established. The same issue concerning federal court jurisdiction involving the IGRA was recently addressed by the United States District Court for the Southern District of Alabama in Poarch Band of Creek Indians v. State of Alabama, et al., No. 91-0757-AH-M (November 1, 1991). The Poarch court fully analyzed each of the possible exceptions to the sovereign immunity bar: waiver of immunity through consent; Congressional abrogation of immunity; and the Ex parte Young doctrine and concluded that none of the exceptions applied in that case. Poarch Band of Creek Indians v. Alabama, No. 91-0757-AH-M at 5. This Court also analyzes the same possible exceptions.

a. Express Consent

The Supreme Court of the United States has determined that one way that a state may lose its immunity is to expressly consent to suit in federal court. Id. at 6-7; Clark v. Barnard, 108 U.S. 436, 447 (1883). In this case, express consent to suit

by the state of Washington is not argued, nor is there a basis to find the State has consented to be sued.

b. Congressional Abrogation

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Supreme Court determined that another way that the sovereign immunity bar is removed occurs when Congress abrogates a state's Eleventh Amendment sovereign immunity through legislation, pursuant to Section 5 of the Fourteenth Amendment. Fitzpatrick at 456. The Supreme Court has also determined that Congress may abrogate a state's sovereign immunity when acting pursuant to the Interstate Commerce Clause. Pennsylvania v. Union Gas, 491 U.S. 1, 12 (1989). In Dellmuth v. Muth, 491 U.S. 223 (1989), the Court emphasized that Congress' intent to abrogate the States' sovereign immunity must be "unmistakably clear in the language of the statute." Dellmuth v. Muth, 491 U.S. at 226 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 (1985)).

The Tribe argues that Congress used "unmistakably clear" language to abrogate States' sovereign immunity in the Indian Gaming Regulation Act, which Congress enacted pursuant to the Indian Commerce Clause. The issue before this Court is whether Congress may properly abrogate States' sovereign

immunity when acting pursuant to the Indian Commerce Clause.[2]

The first step in the analysis is to determine whether a significant difference exists between Congressional powers arising from the Indian Commerce Clause and Congressional powers arising from the Interstate Commerce Clause.[3] The United States Supreme Court noted in Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989):

> It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation [citation omitted], the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs [citation omitted]. The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause. Most notably . . . [it is] inappropriate to apply Commerce Clause doctrine developed in the context of commerce "among" States with

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[2] The parties have not cited cases to the Court, nor has the Court found cases through its own research, that indicate that either the United States Supreme Court or the Court of Appeals for the Ninth Circuit has ruled on whether Congress has the authority, pursuant to the Indian Commerce Clause, to abrogate States' sovereign immunity.

[3] Both the Indian Commerce Clause and the Interstate Commerce Clause are found in Article I, section 8 of the United States Constitution, which give Congress the power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. Const. Art. I, § 8.

mutually exclusive territorial jurisdiction to trade with" Indian tribes.

Cotton Petroleum v. New Mexico, 490 U.S. at 192. The Cotton Petroleum Court concluded that it was inappropriate to apply theories from one of the commerce clauses to the other. Id. at 193.

The Supreme Court in Blatchford noted an important difference in the relationship between sister States in the Interstate Commerce Clause and the relationship between States and Indian Tribes in the Indian Commerce Clause. That difference is that States have surrendered immunity to each other, creating a "mutuality of concession," but Indian Tribes have retained immunity to suits by States, so no mutuality of concession exists. Blatchford v. Native Village of Noatak, 111 S.Ct. 2578, 2583 (1991). As the Court expressed in Blatchford, "What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession." Id. at 2582. Since the Tribes have retained their immunity from suit by the States, the Court reasoned that the States have retained their immunity from suit by Indian Tribes. Id. at 2583.

After reviewing the Blatchford and Cotton Petroleum decisions in relationship to the other case law available, this Court concludes that a significant difference exists between Congressional power stemming from the Indian Commerce Clause and Congressional power stemming from the Interstate

Commerce Clause. There is no basis for this Court to conclude that Congress has the authority to abrogate States' Eleventh Amendment sovereign immunity to suits from Indian Tribes by enacting legislation pursuant to the Indian Commerce Clause. Having determined that Congress did not have the authority to abrogate the States' sovereign immunity in the Indian Gaming Regulation Act, it is not necessary to address whether Congress used "unmistakably clear" language in an attempt to abrogate States' immunity.

Without an effective abrogation of sovereign immunity, this Court does not have jurisdiction over this suit against the State of Washington under either 28 U.S.C. § 1362 or 25 U.S.C. § 2710. Therefore, the Court **GRANTS** the Defendant State of Washington's Motion to Dismiss the State of Washington, based on the Eleventh Amendment sovereign immunity bar to suit in federal court.

c. Ex parte Young Doctrine

The Court next addresses the second issue presented in Defendants' motion: whether, absent federal court jurisdiction over the Defendant State of Washington, this Court has jurisdiction over the individual defendants named in this suit.

The Supreme Court of the United States established in Ex parte Young, 209 U.S. 123 (1908), that the Eleventh Amendment does not act as a bar to a suit in federal court to

enjoin state officials from acting in violation of the Constitution or of federal laws. Ex parte Young, 209 U.S. 123 (1908).

The Court further narrowed the application of the Ex parte Young doctrine in Edelman v. Jordan, 415 U.S. 651 (1974). In Edelman, the Court determined that the Eleventh Amendment serves as a bar to retroactive benefits because the benefits would have to come from the State, and thus, the State would be the real party in interest. Edelman v. Jordan, 415 U.S. at 667-68. The Court noted that a federal court's remedial power under the Ex parte Young doctrine is limited to prospective injunctive relief and could not include a retroactive award that would require expenditure of State funds. Id. at 677.

The Supreme Court's concern regarding whether State Funds are involved relates to whether the State, or the officer of the State, is the "real, substantial party in interest." Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U.S. 459, 464 (1945). When the State is the "real, substantial party in interest," the Eleventh Amendment bars the suit, even if state officials are named as defendants rather than the State. Id.

The Supreme Court has noted that when a plaintiff sues a state official alleging violation of federal or Constitutional laws, the federal court may grant an injunction to govern the future conduct of the official, even though the court cannot award retroactive monetary relief. Pennhurst State School &

Hospital v. Halderman, 465 U.S. 89, 102-03 (1984). However, as the Court stated in Kentucky v. Graham, 473 U.S. 159 (1985), when monetary relief is "ancillary" to the injunctive relief awarded in a case against an official, then the monetary relief is not barred by the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159, 169 n. 17 (1985).

In this case the Plaintiff Tribe has alleged that Defendant Booth Gardner, Governor, and Defendant Frank Miller, Deputy Director of the Washington State Gambling Commission, have violated a federal law, by not negotiating with the Tribe in good faith, as required by IGRA, 25 U.S.C. § 2710. The Tribe contends that under Ex parte Young, the individual defendants named are not barred from suit in federal court by the Eleventh Amendment. This Court agrees with Plaintiff's contention.

The Tribe is seeking a declaratory judgment that the Defendants have failed to negotiate with the Tribe in good faith. In addition, the Tribe is seeking a mandate ordering the Defendants to comply with IGRA, 25 U.S.C. § 2710(d)(7)(B)(iv), and conclude a tribal/state compact governing the conduct of Class III gaming activities on Spokane Indian lands within a sixty day period from the date of the Order or be subject to a mediator's resolution of any impasse. Clearly, such remedies are available against state officials under Edelman, which allows for "prospective injunctive relief" governing

officials' future conduct. Edelman v. Jordan, 415 U.S. 651, 677 (1974).

The State contends that the Ex parte Young doctrine does not apply in this case because the relief sought by the Tribe would be an impermissible infringement on the exercise of discretion on the part of the state officials. In support of their contention, the Defendants quote Ex parte Young:

> There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty.

Ex parte Young, 209 U.S. 123, 158 (1908). The Defendants argue that the type of relief sought by the Plaintiff Tribe, that is a request for a declaratory judgment that the State has not negotiated in good faith and an injunction requiring the State to negotiate in good faith, affect the exercise of discretionary power that lies outside of the boundaries of the Ex parte Young legal fiction.

The Court is concerned that a request to enjoin Defendants to "negotiate in good faith" may infringe on

executive discretion regarding negotiation with the Tribe.[4] However, the Court also is concerned that failure to assert jurisdiction will deprive the Tribe of a forum in which to present its contentions. In balancing these competing concerns the Court determines that the potential intrusion into State executive discretion in this case is outweighed by the actual total deprivation of a forum for the Tribe to address its grievances.

The Court concludes that the Plaintiff Tribe's requested remedy of prospective injunctive relief would not require unwarranted judicial interference into executive discretion. The Court concludes that the Plaintiff Tribe's complaint against the individual defendants falls directly within the parameters set by Ex parte Young, because the Tribe is seeking a method to establish jurisdiction to require State officials to comply with a federal statute. By applying the Ex parte Young rationale to this case, the Court concludes that federal court jurisdiction has been

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[4] As the Court considers Defendants' argument that the Ex parte Young fiction does not apply to discretionary acts, two perplexing issues arise: whether the Court's assertion of federal court jurisdiction in this matter would be an unwarranted judicial interference into executive discretion; or whether the Court's refusal to assert federal court jurisdiction in this matter would deprive the Tribe of any practical forum for their grievance. The Court seriously considers the issue of judicial interference of executive discretion, which has ben raised in various contexts. See, e.g., John P. Dwyer, Pendent Jurisdiction and the Eleventh Amendment, 75 Calif. L. Rev. 129, 149 (1987) (citing Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 319 (1980); Kevin C. Mulder, The Extension of Comity: Fair Assessment in Real Estate Association v. McNary, 32 Am. U.L. Rev. 1123, 1133 (Summer 1983); Ruth Colker, Administrative Prosecutorial Indiscretion, 63 Tul. L. Rev. 877, 899-900 (1989).

established against the individual defendants, Governor Gardner and Deputy Director Miller. Defendants' Motion to Dismiss the Individual Defendants from this case is **DENIED.**

IT IS HEREBY ORDERED: Defendants' Motion to Dismiss the State of Washington is granted and, in the alternative, Defendants' Motion to Dismiss the Individual Defendants is denied. The Motion, **Ct. Rec. 9,** is **Granted in part** and **Denied in part.**

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order, furnish copies to counsel, and dismiss the State of Washington.

DATED this 31 day of December 1991.

/s/
FRED VAN SICKLE
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

THE SPOKANE TRIBE OF INDIANS,	)	
Plaintiff,	)	
vs.	)	No. CS-91-212-FVS
BOOTH GARDNER, GOVERNOR OF THE STATE OF WASHINGTON; KEN EIKENBERRY, ATTORNEY GENERAL OF THE STATE OF WASHINGTON; FRANK MILLER, DEPUTY DIRECTOR OF THE WASHINGTON STATE GAMBLING COMMISSION,	)	ORDER GRANTING CERTIFICATION
Defendants.	)	

BEFORE THE COURT is Plaintiff's Motion for Certification for Appeal of Interlocutory Order Dismissing Fewer Than All the Parties, (Ct. Rec. 41), heard without oral argument on April 15, 1992. Scott Crowell represented the Plaintiffs; Assistant Attorney General Richard Heath appeared on behalf of the Defendants.

The Plaintiffs are the Spokane Tribe of Indians ("Tribe") who filed this case pursuant to the Indian Gaming Regulation Act, 25 U.S.C. §§ 2701 et. seq., against the State of Washington

and the above named defendants. The Defendants moved for dismissal of the suit. The Court granted Defendants' Motion to Dismiss the State of Washington, but denied the Motion to Dismiss the Individual Defendants. (Ct. Rec. 22.) The individual defendants appealed the Court's denial of their Motion to Dismiss and this Court granted Defendants' Motion to Stay the proceedings in this court pending their appeal to the court of appeals. (Ct. Rec. 41.)

The Plaintiffs now move this Court to grant certification for appeal of its interlocutory order dismissing fewer than all the parties pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, or in the alternative, pursuant to 28 U.S.C. § 1292(b). (Ct. Rec. 22.) The Defendants have filed a brief in support of certification under Rule 54(b). (Ct. Rec. 42.)

A court of appeals may permit an appeal from an order if application for appeal is made within ten days after the entry of the order. 28 U.S.C. § 1292(b). In this case, the order dismissing the State of Washington as a defendant was filed on December 31, 1991. (Ct. Rec. 22.) The Plaintiffs did not file their motion for certification until March 13, 1992. Therefore, the ten day limit established in 28 U.S.C. § 1292(b) has already expired. The Court denies Plaintiffs' Motion for Certification based on 28 U.S.C. § 1292(b).

A court may direct the entry of a final judgment as to fewer than all of the parties if the court makes "an express determination that there is no just reason for delay." Fed. R. Civ. P. 54(b). Certification under Rule 54(b) allows a party to appeal an order when other provisions have not been satisfied. See Branson v. City of Los Angeles, 912 F.2d 334, 335 (9th Cir. 1990).

Rule 54(b) allows a court "to enter a final judgment as to less than all the claims or parties to an action, if . . . the ends of justice so require." 10 Wright & Miller, Federal Practice & Procedure § 2655 (2d ed. 1983). A party cannot appeal a ruling until certification is granted under Rule 54(b) or until all the issues of a case have been resolved. Id.

Three conditions must apply to satisfy Rule 54(b). Fed. R. Civ. P. 54(b). First, multiple claims for relief or multiple parties must be involved in the case. 10 Wright & Miller, Federal Practice & Procedure § 2655 (2d ed. 1983). This condition is satisfied if all of the claims for one of the parties are fully adjudicated. Second, "at least one claim or the rights and liabilities of at least one party must be finally decided." Id. Third, the court must determine from the facts of the case "that there is no just reason for delaying an appeal." Id. One factor for a court to consider is whether certification would avoid piecemeal litigation. Id. at § 2659.

In this case, the first condition is satisfied, because the named defendants are the State of Washington, Governor Booth Gardner, Attorney General Ken Eikenberry, and Deputy Director of the Washington State Gambling Commission Frank Miller. The second condition is satisfied because the Court dismissed the claims against the State of Washington. The third condition requires that no just reason for delaying the appeal exist.

In their briefs, both parties have agreed that consolidation of the Plaintiff's appeal regarding dismissal of the State of Washington with the Defendants' appeal regarding denial of the dismissal against the individual defendants would result in judicial economy. The Court is persuaded that the issues on appeal, enforcement of IGRA provisions and application of the Ex Parte Young doctrine involving discretionary actions of officials, are intertwined and should be reviewed together to avoid piecemeal litigation. The Court concludes that there is no just reason for delaying Plaintiff's appeal.

IT IS HEREBY ORDERED: the Plaintiff's **Motion for Certification For Appeal of an Interlocutory Order Dismissing Fewer Than All the Parties, Ct. Rec. 41,** is **GRANTED.**

IT IS SO ORDERED. The Clerk is hereby directed to enter a final judgment against the Plaintiff in the claims against the State of Washington, enter this Order, furnish copies to

counsel, and **close this case** with leave to reopen following resolution of the appeal.

DATED this 15th day of April 1992.

/s/
FRED VAN SICKLE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUDGMENT IN A CIVIL CASE

Spokane Tribe of Indians,
Plaintiff

Case No. 2:91-cs-00212

v.

State of Washington, et al
Defendant
_____/

DECISION BY COURT:

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED. the Plaintiff's Motion for Certification For Appeal of an Interlocutory Order Dismissing Fewer Than All the Parties, Ct. Rec. 41, is GRANTED.

JAMES R. LARSEN, CLERK

by: /s/
Deputy Clerk

Date: April 15, 1992

cc: all counsel

INDIAN GAMING REGULATION

25 U.S.C. §§ 2701, 2702, 2703, 2710 (Supp. 1994)

§ 2701. Congressional Findings

The Congress finds that–

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

(Pub.L. 100-497, § 2, Oct. 17, 1988, 102 Stat. 2467.)

§ 2702. Congressional declaration of policy

The purpose of this chapter is–

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure

that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

(Pub.L. 100-497, § 3, Oct. 17, 1988, 102 Stat. 2467.)

§ 2703. Definitions

For purposes of this chapter--

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term "Indian lands" means--

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which--

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means--

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only is such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include--

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian

land shall cease to operate on the date next following the date of such judiciai decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

(Pub.L. 100-497, § 4, Oct. 17, 1988, 102 Stat. 2467; Pub.L. 102-238, § 2(a), December 17, 1991, 105 Stat. 1908; Pub.L. 102-497, § 16, Oct. 24, 1992, 106 Stat. 3261.)

§ 2710. Tribal gaming ordinances

(a) Exclusive jurisdiction of Class I gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of Class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respec to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent

person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706(b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsec. (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that–

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

. . . Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the

Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the

Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State

laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to

conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the

mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

(Pub.L. 100-497, § 11, Oct. 17, 1988, 102 Stat. 2472.)

(2)

Supreme Court, U.S.
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No. 94-357

In The

Supreme Court of the United States

October Term, 1994

THE STATE OF WASHINGTON, et al.,

Petitioners,

v.

THE SPOKANE TRIBE OF INDIANS,

Respondent.

On Petition For Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, IDAHO, KANSAS, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

i. Should this Court resolve the conflict in the federal appellate circuits by upholding the states' sovereign immunity under the Eleventh Amendment from suit in federal court by Indian tribes?

ii. Does Congress have the power to abrogate the states' sovereign immunity when legislating under its plenary powers in the Indian Commerce Clause?

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INTEREST OF AMICI STATES

This case goes to the heart of our federal system of government – the relationship of States of the Union and the Federal Government. At issue is the ability of the federal Congress to displace and dismiss the sovereign interests of the States by subjecting them to suit in federal court to compel them to perform solely *federal* governmental functions. Only this Court is poised to protect vital interests of state sovereignty.

This Court is presented here and in related cases for the first time with the question whether Congress has the power to abrogate the states' sovereign immunity under the *Indian* Commerce Clause, article I, section 8, clause 3 of the United States Constitution. While the power to abrogate has been found in Section 5 of the Fourteenth Amendment and in the *Interstate* Commerce Clause, this Court has not uncovered to date any other provision that permits the Congress to annul the judicial sovereign immunity of the states inherent in the structure and requirements of our federal system of government, and as exemplified in the Eleventh Amendment.

The States of the Union share an immediate and serious concern with the difficult and irregular implementation of a overreaching Act of Congress and the corresponding proliferation of conflicting federal appellate and district court decisions interpreting that Act. Only this Court can resolve these conflicts. These cases arise under the provisions of the Indian Gaming Regulatory Act, Pub.L. No. 100-497, 102 Stat. 2467 (codified at 18 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721) (hereinafter IGRA). Each amicus state has lands (or may have

lands taken in the future by the federal government) that fall within the definition of "Indian lands" under 25 U.S.C. § 2703(4). Each of these states allows or may allow in the future some form of gaming to be operated within its respective borders. The forms of gaming that are permitted, prohibited or regulated differ from state to state, as these are matters solely of state law. Most amici states have been or may become involved in negotiations for tribal-state compacts for gaming to be operated on such lands, as required by IGRA.[1] These negotiations have resulted in highly divergent results from state to state – including, in some states, compacts for Indian gaming operations which are prohibited to the citizens of the state at large. More commonly, the result is lawsuits filed against states in federal court by Indian tribes demanding the states compact for casino gambling even where it is criminally prohibited. While it is in the latter category that this particular suit arises – in the State of Washington – other states similarly situated fear the same federal court compulsion to permit that which they criminally prohibit. This Court already has before it the petitions and cross-petitions of the States of Alabama and Florida, and likely will see those of Oklahoma, Kansas, and New Mexico. The states are witnessing the serious degradation of their jurisdiction under this Act of Congress and possess a vital interest in having this Court protect state sovereignty.

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[1] Amici states Maine, Massachusetts and Rhode Island contend they are not subject to IGRA, based on their respective Indian land claims settlement acts.

Amici States now face the prospect in certain federal circuits that they may be subjected to suit in federal court without their consent and against their will by Indian tribes in violation of the Eleventh Amendment to the United States Constitution, compelling them to perform acts which the Congress can not lawfully require under the Tenth Amendment.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding that Congress has the power to abrogate the state's Eleventh Amendment immunity when legislating under the Indian Commerce Clause is at odds with the holding of the Eleventh Circuit in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (1994), that Congress has no such power. Certiorari should be granted to resolve conflicts between the Eighth, Ninth, Tenth and Eleventh Circuits, as the varying and disparate interpretation and application of the Indian Gaming Regulatory Act of 1988 ("IGRA") by the federal courts has left states with no guidance with respect to the Act. Resolution of these questions is of profound consequence to the states concerned.

The federal circuits have differed sharply on their reading of and the arguable application of *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), to cases involving federal legislation under the Indian Commerce Clause. In that case, this Court held that Congress may abrogate state sovereign immunity based on its *Interstate* Commerce Clause power; the Ninth Circuit, however, read the power as derived from the Commerce Clause as a whole,

and thus, applied *Union Gas* to Indian Commerce Clause legislation. The States have a vital interest in protecting their sovereign immunity against further encroachment by the federal legislation that subjects them to suit in federal court, and argue that this Court should grant certiorari in order to settle the question whether Congress can freely abrogate state sovereign immunity under the Indian Commerce Clause.

The States also argue that this Court has only upheld the congressional abrogation of state sovereign immunity where Congress' power to enact legislation under the constitution would be incomplete without subjecting states to suit in federal court. IGRA presents no such cause or necessity to subject states to suit by Indian tribes in order to accomplish its regulation of Indian gambling, a matter under its complete and plenary authority over Indian affairs under the Constitution. As argued, Congress sidestepped federal regulation of these matters and instead enacted a scheme that coerces the States to carry out a federal regulatory scheme as if the States were mere subdivisions of the national government. IGRA's compulsion of the States to negotiate tribal-state gambling compacts and its sanction of a lawsuit in federal court by Indian tribes to compel the negotiations and compacting is a definitive example of a Tenth Amendment violation enforced by an Eleventh Amendment violation.

ARGUMENT

I

THE STATES HAVE A VITAL INTEREST IN THIS COURT RESOLVING THE CONFLICT IN THE FEDERAL CIRCUITS

The holding by the Ninth Circuit that Congress has the power to abrogate the state's sovereign immunity under the Indian Commerce Clause is at odds with the holding of the Eleventh Circuit in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (1994), that Congress has no such power. That disparity gives three states – Alabama, Georgia and Florida – the benefit of a rule that bars Indian tribes from suing these states under IGRA in federal court without their consent, while the eight states with Indian tribes in the Ninth Circuit – Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon and Washington – live under a different rule established in this case and stand subject to suit under the provisions of IGRA without the states' consent. Additionally, states in the Eighth and Tenth federal appellate circuits are subject to the same rule now found in the Ninth Circuit. The same issue is pending in the Fourth and Fifth Circuits. This disparity in the application of the same federal law is of profound consequence to the states concerned. Such a conflict among the circuits is within the scope and character of the reasons for granting certiorari in Supreme Court Rule 10.1(a). Indeed, the conflict can only be resolved by this Court.

The Ninth Circuit concluded here that the plurality decision in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989),

held that Congress may abrogate state sovereign immunity based on its Commerce Clause power as a whole, not restricted to the *interstate* prong. *Spokane Tribe of Indians v. State of Washington*, 28 F.3d 991, 996 (9th Cir. 1994). This reading of *Union Gas* differs sharply from that of the Eleventh Circuit in *Seminole, supra*, where the court noted that the *Union Gas* Court in each of its opinions – plurality, concurrences and dissents – addressed only the *Interstate* Commerce Clause. 11 F.3d at 1027. States heartily agree with the Eleventh Circuit's reading, given the express reference to the interstate prong in the plurality opinion in *Union Gas*, 491 U.S. at 15, and the rationale of the opinion, going to the regulation of commerce among states.

Additionally, the Ninth Circuit concluded that the *Union Gas* rationale that finds congressional power to abrogate state sovereign immunity extends equally to the Indian prong of the Commerce Clause because that clause embodies a plenary power of the Congress that limits the power of the states. *Spokane*, at 996-997. The Ninth Circuit lightly dismisses the discussion by the Eleventh Circuit of the unique qualities that distinguish the Interstate Commerce Clause and the Indian Commerce Clause. The *Seminole* court aptly noted

> In [*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192], the Court acknowledged the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states [was] in order to "maintain[ ] free trade among the States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with power to legislate in the field of Indian affairs. *Id.* Although Congress

> has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate they be treated distinctly.

11 F.3d at 1027. These sharply different readings of the *Union Gas* opinion and the diametrically opposed conclusions as to abrogation power under the Indian Commerce Clause leave the states with no guidance as to whether suits by tribes against the states, without the consent of the states, are jurisdictionally barred or not.[2]

---

[2] The Eighth and Tenth Circuits also present a conflict with the Eleventh Circuit on this same issue. In *Cheyenne River Sioux v. State of South Dakota*, 3 F.3d 273 (1993), the Eighth Circuit relied on the decision of the district court in *Seminole Tribe of Florida*, reversed by the Eleventh Circuit, for the notion that the Indian Commerce Clause provided the congressional power to abrogate the states' sovereign immunity. 3 F.3d at 280-81. Additionally, the Tenth Circuit has similarly found a congressional power to abrogate state sovereign immunity under the Indian Commerce Clause simply because Congress has plenary power under that clause. *Ponca Tribe of Oklahoma v. State of Oklahoma*, ___ F.3d ___, 1994 U.S.App. LEXIS 24084, filed Sept. 2, 1994, slip op. at 20, 10th Cir. Nos. 92-6331, 93-2018, 2020, 3110, consolidated on appeal with *Pueblo of Sandia v. New Mexico*, *Apache Tribe of Mescalero Reservation v. New Mexico*, and *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas v. Kansas*.

Revealing the many conflicts in the federal district courts are the following cases pending in the circuit courts: *Eastern Band of Cherokee Indians v. North Carolina*, No. 2:92-CV-239, slip op. (W.D. N.C. June 16, 1993) (granted motion to dismiss on Eleventh Amendment grounds), *appeal docketed*, No. 93-1936 (4th Cir. 1993); *Ysleta del Sur Pueblo v. Texas*, 852 F. Supp. 587 (W.D. Tex. 1993) (denied motion to dismiss on Eleventh Amendment grounds), *appeal docketed*, Nos. 93-8823 &-8477 (5th Cir. 1993); *Blackfeet Tribe v. Jessup*, No. CV-93-031-GF, slip op. (D. Mont. Dec. 23, 1993) (granted motion to dismiss on Eleventh

II

CONGRESS' POWER TO ABROGATE STATE SOVEREIGN IMMUNITY UNDER THE INDIAN COMMERCE CLAUSE IS AN IMPORTANT QUESTION OF FEDERAL LAW NOT SETTLED BY THIS COURT

Amici States also have a vital interest in the resolution of the question presented by the Ninth Circuit, as it goes to the fundamental relationship of the States with the Federal Government, presenting important questions of federalism. This Court has not been presented with, and thus, has never settled the question whether Congress has the power to abrogate the states' sovereign immunity under the Indian Commerce Clause, article I, section 8, clause 3 of the U.S. Constitution. To date, this Court has found Congress' power to abrogate only in Section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) and in the *Interstate* Commerce Clause, *Union Gas, supra*. The significance of finding yet another constitutional provision that gives the Congress power to abrogate state sovereign immunity cannot be understated – it would lead to a critical undermining of our federal system of government, further strengthening the power of the federal government at the expense of the states. *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989). The resolution of this question, then, falls within the scope and character of the reasons for granting certiorari under Supreme Court Rule 10.1(c).

Amendment grounds), *appeal docketed* No. 94-35079 (9th Cir. 1994); and *Fort Belknap Indian Community v. Montana*, slip op. No. CV-92-098-GF (D. Mont. Jan. 5, 1994) (granted motion to dismiss on Eleventh Amendment grounds), *appeal docketed* No. 94-35126 (9th Cir. 1994).

This Court has recognized that the Eleventh Amendment generally bars suits against a state by an Indian tribe. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 2581-83 (1991). The Eleventh Amendment is only emblematic of the states' sovereign immunity, which is itself "part of the understood background against which the Constitution was adopted, . . . " *Union Gas*, 491 U.S. at 32 (Scalia, J., concurring in part and dissenting in part); *see also Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 487 (1987). Before Congress can effectively abrogate a state's sovereign immunity, it must have constitutional authority to do so. *Green v. Mansour*, 474 U.S. 64, *reh'g denied* 474 U.S. 1111 (1985) ("States may not be sued in federal court unless . . . Congress, *pursuant to a valid exercise of its power*, unequivocally expresses its intent to abrogate the immunity." Emphasis added.); *Blatchford, supra*, 111 S.Ct. at 2584 ("Our cases require Congress' exercise of the power to abrogate state sovereign immunity, *where it exists*, to be exercised with unmistakable clarity." Emphasis added.). *See also Atascadero State Hosp. & California Dep't of Mental Health v. Scanlon*, 473 U.S. 234 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). The *Blatchford* court had no occasion to consider in that case whether Congress had the power to abrogate as it found no statutory expression of clear and unequivocal intent to abrogate; the Court did not need to reach the question of the existence of the congressional power. 111 S.Ct. at 2584 ("power to abrogate . . . *where it exists* . . . ").

Blatchford, however, did address whether there was a *waiver* of state sovereign immunity "inherent in the plan of the convention," and concluded

> [T]here is no compelling evidence that the Founders thought such a surrender [of sovereign immunity] inherent in the constitutional compact. [. . .] What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citation omitted], as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 111 S.Ct. at 2582-83, emphasis in original. While this holding on waiver does not answer directly whether Congress has the power to *abrogate* state sovereign immunity under its plenary powers in the Indian Commerce Clause, it is a compelling *indirect* answer that Congress does not have that power. When the States compacted with a federal government and gave certain powers over to it, reserving others, how could the States have contemplated Congress nullifying that immunity which they did not surrender for the benefit of Indian tribes?

To suggest that Congress may freely abrogate state sovereign immunity pursuant to any plenary power given it in the Constitution misses the point of judicial immunity. Even where this Court in a plurality opinion, joined by Justice White concurring in the result, upheld the congressional power to abrogate state sovereign immunity under the Interstate Commerce Clause, it did

so only *"because the congressional power would be incomplete without the authority to render the States liable in damages, . . . " Union Gas,* 491 U.S. at 19-20; emphasis added. In other words, the power to abrogate was found to exist only because Congress found it *necessary* to render the states liable in federal court in order to accomplish its purpose in legislating under the Interstate Commerce Clause. *Union Gas* considered Congress' enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), providing means to clean up hazardous waste sites throughout the country. The Act provided who would be liable for the cost of remedial action, and Congress, legislating under the Interstate Commerce Clause, found it was *necessary* to hold the states financially accountable for certain costs of this remedial action. The remedial action would be incomplete without making the states liable *in federal court.*

Similarly, in *Fitzpatrick,* as in *Union Gas,* Congress could not enforce Title VII of the Civil Rights Act of 1964 without making the states, as employers, *liable in federal court* for damages and attorneys fees for unlawful employment discrimination. *Fitzpatrick,* 427 U.S. at 456 ("Congress may . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). Thus, the power to abrogate arises only where Congress's power when legislating pursuant to Section 5 of the Fourteenth Amendment or the Interstate Commerce Clause is incomplete without subjecting states to suit in federal court.

Here, the critical question which needs to be settled by this Court is whether the Congress, in passing IGRA,

had the power under the Indian Commerce Clause to abrogate state sovereign immunity. Amici States contend this question can only be settled by examining whether it was necessary to subject a state to suit in federal court by an Indian tribe in order to accomplish Congress' purpose in regulating Indian gaming. As is evident, however, Congress has plenary and absolute power in Indian affairs and states are not essential to that power. Nor can Congress compel states to aid what the federal government may do solely within its power by having them implement a federal regulatory process, *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992), as if the States were mere subdivisions of a national government. Because Congress is granted plenary power in Indian affairs, and its power thereunder is not incomplete without authority to compel the States to do its bidding in Indian matters, then it is without such power altogether.

In fact, Congress could have provided for the *federal* regulation of Indian gaming, wholly apart from any involvement by the states, coerced or voluntary. Instead, Congress chose to compel the states to negotiate tribal-state compacts under 25 U.S.C. § 2710(d)(3)(a); subject them to being hauled into federal court under a claim that they failed to negotiate in good faith under 25 U.S.C. § 2710(d)(7); subject them to the compulsion of a federal court order to further negotiate; subject them to compulsion to submit differences to mediation; and subject them to compulsion to submit last best offers to a court-appointed mediator and make a selection from the mediator. 25 U.S.C. 2710(d)(7).

Therefore, the States are presented with a perplexing and unpalatable set of conditions: if the Ninth Circuit ruling is upheld, states will continue to be subjected to lawsuits by Indian tribes they may not sue themselves, which lawsuits are solely to compel the states to perform acts that are not within their scope of affairs and which are wholly within the scope of the federal government's plenary powers. Because subjecting the States to suit by Indian tribes in federal court is not essential to the power of the Congress to provide for Indian gaming, Congress has no power to abrogate the state's Eleventh Amendment immunity. Under the Ninth Circuit's reasoning that any plenary power in the Congress gives rise to a power to abrogate state sovereign immunity, a constitutional wall has been reduced to a statutory hurdle and the Eleventh Amendment is rendered superfluous.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari filed by the State of Washington should be granted.

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No. 94-357

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE STATE OF WASHINGTON, *et al.*,

Petitioners,

v.

THE SPOKANE TRIBE OF INDIANS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ALTERNATIVE STATEMENT OF QUESTIONS PRESENTED

Respondent Tribe agrees with the phrasing of Petitioner's Question #1

Question #2 is more appropriately framed as follows:

2. Whether, under *Ex parte Young,* 209 U.S. 123 (1908) and its progeny, a tribe may bring an action under the Indian Gaming Regulatory Act against individual state officials for prospective injunctive relief ordering those officials to comply with federal law.

If review is accepted, a third and fourth question are appropriately added:

3. In the event that the Eleventh Amendment precludes lawsuits by tribes against nonconsenting states or state officials, what remedy if any, is available to tribes against states that fail to conclude compact negotiations in good faith?

4. In the event that no remedy is otherwise available to tribes, whether IGRA, in its entirety, should be struck down as unconstitutional.

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No. 94-357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE STATE OF WASHINGTON, *et al.*,

Petitioners,

v.

THE SPOKANE TRIBE OF INDIANS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court below has been published since the filing of the Petition. The opinion is cited as *Spokane Tribe v. Washington State et al.*, 28 F.3d 991 (9th Cir. 1994).

CORRECTIONS TO PETITIONERS' "STATEMENT"

The Petitioners' "Statement" is accurate in most respects, however, a few points need correction or clarification.

First, the Petition at footnote 3, makes reference to approved compacts between Washington State and other tribes with Indian lands in Washington State. The footnote has no factual relevance to the Petition. The District Court has never reached the merits of the Tribe's claims, which would include a factual demonstration that the referenced compacts are the product of coercion and duress, and not the product of good faith negotiations required under IGRA.

Second, the Petition at page six, characterizes the lawsuit as "seeking a declaration that the State failed to negotiate in good faith." More clearly, the Tribe is seeking the remedies available under IGRA, including the appointment of a Mediator that is empowered to select a compact and to notify the Secretary of Interior of the state's refusal to consent to the selected compact.

ARGUMENTS FOR DENYING THE PETITION

No special or important reason exists favoring review of the opinion below. Contrary to the assertions of Washington State and the amici states, this case involves no more than the application of well-settled principles to a familar situation. Although the Eleventh Circuit conflicts, in reasoning but not in ultimate result, with the Eighth, Ninth & Tenth Circuits, it is not the type of real and embarrassing conflict that justifies the use of this Court's scarce judicial resources. In the even that this Court does grant review, the Court should consider what remedies, if any, are available to tribes under the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701 et seq. (IGRA), when confronted with state governments hostile to IGRA's compacting process.

I.

THE STATES' PERCEIVED CONFLICT IS AN ANOMALY, WHICH DOES NOT ALTER THE REMEDY ULTIMATELY AVAILABLE TO TRIBES UNDER IGRA; AND IS NOT THE TYPE OF REAL AND EMBARRASSING CONFLICT, WHICH JUSTIFIES THE USE OF THE COURT'S JUDICIAL RESOURCES.

Four Circuit courts have addressed the specific issue, in the context of suits brought under the IGRA, of whether Congress has the power to abrogate the states' Eleventh Amendment immunity from suit in federal court pursuant to the Indian Commerce Clause. The Ninth Circuit in the Opinion issued below, ruled that Congress has such authority. The Eighth Circuit previously issued a consistent opinion in *Cheyenne River Sioux Tribe v. South Dakota,* 3 F.3d 273 (8th Cir. 1993). Since the date of Washington State's filing of the Petition, the Tenth Circuit has issued its opinion in *Ponca Tribe of Oklahoma v. Oklahoma,* ___ F.3d ___ , 1994 WL 476316 (10th Cir. September 2, 1994), which concurs in the analysis of the Opinion below in every respect. In each of these cases, the courts upheld a process wherein the Department of Interior may ultimately promulgate procedures in lieu of a compact for a tribe's class III gaming operation if the tribe is confronted with a hostile state government that refuses to consent to the process provided for in IGRA. The decision rendered in the Eleventh Circuit, *Seminole Tribe of Florida v. Florida,* 11 F.3d 1016 (11th Cir. 1994), ruled that Congress did not have such authority to abrogate the states' Eleventh Amendment immunity, but also ruled that tribes confronted with states that hide behind the Eleventh Amendment may directly proceed to the Department of Interior (DOI) for the procedures in lieu of a compact. *Id.* at 1029.

Those four appellate decisions should be the focus of this Court's attention in determining whether to grant review. Except for the anomaly in the Eleventh Circuit, there is no other conflict in the courts on the issue. The recent opinion in *Ponca Tribe,* overturned those decisions adopting the states' position in Oklahoma[1] and New Mexico[2]. The appeal that had been pending in the Fourth Circuit, *Eastern Band of Cherokee Indians v. North Carolina,* No. 2:92-CV-239 slip op. (W.D.N.C. June 16, 1993) *appeal docketed,* No. 93-1936 (4th Cir. 1993), has been dismised with the consent of the parties because an agreement has rendered the appeal moot. The Amici states make note of several pending cases (Brief of Amicus Curiae States at p. 7 n.2) but they are in the Ninth Circuit and are resolved by the Opinion below. The only Circuit with a dispositive case still pending before it is the Fifth Circuit review of *Ysleta del Sur Pueblo v. Texas,* 852 F.Supp. 587 (W.D. Texas 1993) *appeal docketed,* (5th Cir. 1993). The District Court decision in Texas is consistent with the Ninth Circuit in all respects.

Each of the four Circuit courts, which have addressed the issue to date, ruled that tribes confronted with hostile state governments are ultimately entitled to relief in the form of procedures promulgated by the Department of the Interior. Respondent Washington State correctly points out that the Eleventh Circuit did rule in a manner

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[1] *Ponca Tribe of Oklahoma v. Oklahoma,* 834 F. Supp. 1341 (W.D. Okla 1992).

[2] *Pueblo of Sandia v. New Mexico,* No. CIV 92-613-JC slip op. (D. N.M. Nov. 13, 1992) & *Apache Tribe of Mescalero Reservation v. New Mexico,* No. CIV 92-076-JC slip op. (D. N.M. Dec. 22, 1992).

inconsistent with the analysis of the Eighth Circuit, and with the opinion below. The difference in analysis does not change the ultimate remedy available to tribes, however. The most recent decision in the Tenth Circuit buttresses the opinion below and suggests that the analysis of the Eleventh Circuit is an anomaly, not needing of the imposition of the limited resources of this Court for review.

The Eleventh Circuit based its decision on the assumption that *Pennsylvania v. Union Gas,* 491 U.S. 1 (1989), is no longer good law. *Union Gas* held that those plenary powers inherent in the Interstate Commerce Clause authorized Congress to abrogate Eleventh Amendment Immunity in matters involving interstate commerce. The anomaly in the Eleventh Circuit results from the somewhat arrogant assumption that a change in the personnel of this Court will cause the Court to overturn its 1989 decision in *Union Gas.* This approach brought direct and appropriate criticism by both the Ninth and Tenth Circuit courts:

> [T]he Eleventh Circuit questioned the continuing vitality of the *Union Gas* decision in light of changing Supreme Court membership and the lack of majority opinion. The case, however, remains binding authority upon us.

Spokane Tribe, 28 F.3d at 997.

> In an attempt to sap *Union Gas* of any doctrinal significance, the states in the instant cases first make much of the fact that the court was splintered in *Union Gas* and that Justice White, the fifth vote on the Commerce Clause abrogation question, stated that he did "not agree with much of [Justice Brennan's] reasoning." Id. at 57. However, we are unwilling to sweep aside *Union Gas* as lacking prece-

> dential value or guidance for our analysis. . . . It is beyond dispute that five Justices in *Union Gas* held that Congress possesses the power to abrogate Eleventh Amendment immunity pursuant to the Interstate Commerce Clause of Article I.

Ponca Tribe, 1994 WL 476316 (printout at p. 8).

The analysis of the Eighth, Ninth, and Tenth Circuits involves no more than the application of well-settled principles to a familar situation. The case law is well settled that Congress, acting pursuant to its plenary powers, has the authority in the Constitution to abrogate state soversign immunity. *Pennsylvania v. Union Gas,* 491 U.S. 1 (1989), *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). When the Supreme Court reviewed the plenary powers of Congress in abrogating Eleventh Amendment Immunity in *Union Gas,* it decided the harder case – the Interstate Commerce Clause. As the Ninth and Tenth Circuits have pointed out, the plenary powers of Congress derived from the Interstate Commerce Clause have substantive limitations upon them. Such limitations that are not shared with plenary powers derived from the Indian Commerce Clause. *Spokane Tribe,* 28 F.3d at 997; *Ponca Tribe,* 1994 WL 476316 (printout at p. 8). A review of *Union Gas* is the real objective of Washington State (Petition at pp. 16-18) and the amici states (Brief of Amicus Curiae States at pp. 5-7).

The nature of Congress' plenary authority over Indian country is quite basic, and subject to verification by numerous decisions of this court. The Brief of Amici States, however, demonstrates a basic misperception of state governments towards their role in Indian gaming. The Brief of Amici States candidly concedes: "As is evident, however, Congress has plenary and absolute power

in Indian affairs and states are not essential to that power" (Brief of Amici States at page 12). Yet, the entire Brief is couched in such terms as "degradation" of the state's jurisdiction, "displacement and dismissal of the sovereign rights of the states," and "undermining our federal system of government."[3] Because the Congress has plenary power, there is no reservoir of rights that states have, or ever had, in governing gaming on Indian lands. Consequently, IGRA cannot take something away from the states because they never had it to begin with.

The fundamental relationship of matters of interstate commerce should be revisited in the context of litigation between a state or states and the United States. Acceptance of this litigation to resolve the issues in *Union Gas* places the Respondent Tribe in the untenable position of defending the powers of the United States over states. By contrast, the Indian Commerce Clause involves plenary powers that are far more conclusive than the Interstate Commerce Clause, hence, the Eighth, Ninth and Tenth Circuits, applied well-settled law. Judge Schroeder, in the Opinion below, emphasized this critical distinction:

> Moreover, even if the Supreme Court were to overrule *Union Gas,* and hold that Congress' power to regulate interstate commerce does not permit Congress to abrogate soversign immunity, Congress' broader authority over tribal affairs would remain.

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[3]The Amici States also use these arguments to premise some infringement upon or violation of the Tenth Amendment. The appeal to the Ninth Circuit did not include Tenth Amendment challenges. Petitioners had asserted the argument for the very first time in their Reply Brief to the Ninth Circuit. The Ninth Circuit did not address the issue to any degree. Accordingly, the Tenth Amendment should not be used as basis for granting the Petition.

Spokane Tribe, 28 F.3d at 997. The context of the instant litigation is not the proper context for revisiting *Union Gas.*

Given that all Circuits concur in the ultimate remedy for tribes (DOI regulations), the resolution of the constitutional issue becomes merely hypothetical and does not justify a writ. See *Ticor Title Insurance Co. v. Brown,* ___ U.S. ___, 114 S.Ct. 1359, 1361-62 (1994). The resolution of the issue would only result in mapping the road for tribes to obtain federal DOI regulations governing the regulation of class III games in lieu of a compact. The resolution of the Constitutional issue is better made in a context where it is the dispositive issue.

To the extent that the perceived conflict between the Circuits is substantive, Congress may be the more appropriate forum to resolve the perceived conflict. See *Braxton v. United States,* 500 U.S. 344, 348, 111 S.Ct. 1854, 1858 (1991). Congress is perfectly able to draft legislation that provides a federal remedy to tribes in the event that a remedy involving a state government is unavailable, for whatever reason. Such a legislative scheme is wholly consistent with the remarks of Judge Schroder, below:

> In grappling with the sensitive issues following the state of California's defeat in *Cabazon Band,*[4] Congress tried to fashion a plan that would enable states to have a voice in how tribal gaming should operate and to enforce to some degree the states' own laws. The states' immunity from suits under the Eleventh Amendment should not frustrate that goal. Indeed, principles of state sovereignty are singularly out of place in such a scheme, where the federal government is tailoring a limited grant of power to

[4] *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987).

> the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests.

Spokane Tribe, 28 F.3d at 997.

In short, the states' perceived conflict in the circuits is an anomaly, which does not alter the remedy ultimately available to tribes under IGRA. The anomaly is not the type of real and embarrassing conflict, which justifies the use of the Court's judicial resources.

II.

IF REVIEW IS GRANTED, THE COURT SHOULD INCLUDE IN ITS REVIEW ADDITIONAL SUBSTANTIVE ISSUES THAT BECOME GERMANE IF THE STATES ARE IMMUNE TO LAWSUITS UNDER IGRA.

A. *Ex parte Young* and its progeny.

The District Court below ruled that it did have jurisdiction over defendant state officials in their official capacity, even though it opined that it was compelled to dismiss Washington State on the grounds of Eleventh Amendment immunity. 790 F. Supp. 1057 (E.D. Wash. 1991). The Ninth Circuit, below, vacated the portion of the District Court's Order regarding state officials on the grounds that it was not needed given that Washington State is not immune from suit. 28 F.3d at 998.

The second issue, as framed by Washington State, begs the question as if the naming of state officials is a mere perfunctory act. The Tribe is not "simply naming state officers as defendants." A substantive review of the issue requires the court to look into the nature of the prospective equitable relief sought by the Tribe. State officials should not be allowed to apply state laws against tribal gaming operations in a manner that is inconsistent

with preemptive federal law. The issue is more appropriately framed as follows:

> 2. Whether, under *Ex parte Young,* and its progeny, a tribe may bring an action under the Indian Gaming Regulatory Act against individual state officials for prospective injunctive relief ordering those officials to comply with federal law.

Only if issue #1 (Congressional abrogation) is reviewed by this Court, should this Court also review issue #2 (*Ex parte Young*) as framed above. If issue #1 is to be reviewed, the Respondent Spokane Tribe concurs in the conclusion, but not in the analysis, of Washington State that issue #2, as framed above, should be reviewed by this Court. If jurisdiction over state officials does exist in lawsuits brought by tribes under IGRA, then the constitutional integrity of the act can be saved.

B. If review is granted, the Court should also apply severance analysis to IGRA to determine what remedies, if any, are available to tribes confronted by state governments hostile to IGRA's process.

If the states prevail on issues ##1 (Congressional abrogation) & 2 (*Ex parte Young*), the question remains as to what remedy, if any, is available to tribes confronted by hostile state governments. The Eleventh Circuit turned to this issue in its determination that tribes may proceed to the Department of Interior for procedures in lieu of a compact. *Seminole Tribe,* 11 F.3d at 1029. The federal District Court in *Willis v. Fordice,* 850 F. Supp. 523 (S.D. Miss. 1994) reinforces the Tribe's position in the event IGRA violates the Eleventh Amendment:

> Alternatively, even if IGRA is unconstitutional, the Court must adhere to the decisions of the United States Supreme Court. Therefore, under the

> holding from *Cabazon*, the Court finds that even if Congress lacked the authority to set forth the procedures under IGRA and abrogate the Eleventh Amendment immunity of the states, gaming must still be allowed on Indian lands.

850 F. Supp. at 530. See also, *Confederated Tribes of the Colville Reservation v. Washington*, 20 ILR 3124 (E.D. Wash. 1993) ("If this court were to sever only the mandatory language from IGRA, the Tribe would be left without recourse if they are unable to reach an agreement with the State. . . . Therefore the entire subsection (d) regarding Class III gaming must be severed from the act as unconstitutional"). Accordingly, the Respondent Tribe submits issues ##3 & 4:

> 3. In the event that the Eleventh Amendment precludes lawsuits by tribes against nonconsenting states or state officials, what remedy if any, is available to tribes against states that fail to conclude compact negotiations in good faith?
>
> 4. In the event that no remedy is otherwise available to tribes, whether the Indian Gaming Regulatory Act, in its entirety, should be struck down as unconstitutional.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied. However, in the event that review is granted, the issues should be those identified above such that in the event states are found to be immune from suits by tribes under IGRA, the remedies otherwise available to tribes should also be determined.

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